

**COMPARATIVE ANALYSIS OF PARLIAMENTARY INVESTIGATION,
A TOOL FOR PARLIAMENTARY OVERSIGHT:
UNITED STATES, GERMANY, MONGOLIA**

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INTRODUCTION

The parliamentary system in Mongolia is in its growing stage. A country, which is usually praised by peaceful transition, stable elections and well institutionalized democracy in the region, has recently been marked with violent post election protest caused by alleged election fraud and clash between police and protesters which resulted in 5 civilians' death, hundreds of injured and arrested, and later two hundreds were prosecuted in courts.

After this incident, domestic and international human right organizations were expressing their concern about human rights violence by police and other state agencies during and after the emergency. Also there were many complaints that later prosecution was based on the testimonies which were collected under torture or illegal means, and law enforcement agencies' reluctance to investigate into citizens' deaths. Public controversies are still continuing in media and discussions.

These discussions and demands brought new experience to Mongolian parliament. Two separate working groups within the parliament were established to inquire into this incident, one is from the human rights perspective, and another one is to examine the legality of the government agencies' action during the emergency. One of the working groups held an open hearing, which took testimonies from agencies and victims, broadcasted directly and allowed entering citizen observers. It was the 1st time in history of democratic parliament and attracted much public attention.

But this working group's investigation also provided us a chance to see how parliament is weak before government and how political power deviated to parties. The absence of clear regulation about these kinds of investigation, powers and possibilities necessary to gather evidences gives a room to the major party and government officials to ignore and hinder the investigation. Based on party affiliation, different possibilities were provided in to the working

groups. Human right group was powerless whereas other one though provided access to important information was closed to public.

These working groups' inquiries were versions of parliamentary investigation, which is far more different and weak from general tendency. Parliamentary investigation is a far-reaching oversight tool as in other parliaments, which mostly deals with failure of the executive, with the task of collecting information and reveal the alleged misconducts in certain issue. But these working groups have lacked all necessary power and legal regulation.

The reason of the failure of this instrument is not just lack of legal regulation and powers but overall oversight capacity of the Mongolian parliament, which considered as very weak by its members; also by domestic and foreign researchers. Oversight function of the parliament and its importance is not paid enough attention from the MPs and considered inadequately in legal and institutional framework. Besides, a poor opportunity of the minority or opposition in the parliament to engage in oversight influences this.

Therefore, considering the reasons of failure of the oversight in Mongolia, there is a need of a tool that provides power balance and enhances parliamentary autonomy from executive, and improves transparency to the public.

On this background, my paper's main goal is to provide an improving way of legal framework of Mongolian parliament's oversight of the executive by introducing the parliamentary investigation through committees¹, based on comparative analysis of US Congressional investigation and the German Bundestag committee on inquiry, which are considered as an example of strong parliamentary investigations.

Methodology:

¹ Reports and empirical surveys usually use phrases "committees of inquiry" "parliamentary inquiry", "parliamentary investigation" interchangeably. It's a matter of function of committee, or committee named by its function. In this paper I use "parliamentary investigation" as a one function of parliamentary committee, a general term for this instrument of parliament.

There is significant structural difference between US, German and Mongolian systems. As a study of the parliamentary oversight instrument, influential factor to be considered in the comparison is the general legislative executive relation. The system of government, which is main factor for this relation and shapes overall oversight capacity of the parliament, is different in comparing countries. The US has presidential system of government, which has sharp division of power and competition between branches, while Germany and Mongolia has a parliamentary system, forms closer relation between legislature and executives. This difference in system of government leads to different extent of political incentives and parliament oversight capacity. However, both in Congress and Bundestag, the investigation is directed to oversee executive with enhanced powers and an essential part of the parliament oversight over government. Therefore this paper considered on functional equivalence of these instruments in these systems. One approach to comparative legal research is a functionalist approach, which is more pragmatic leveled comparison, regards different legal systems as “pool of solutions” and use comparative methods to find more suitable and effective solutions to existing problems.

German Basic law provides special ad hoc committee of investigation, within the Bundestag, which is interesting by attaching the investigation to the rights of the minority in the parliament². The Congress of the United States, even though there is no explicit provision in the constitution regarding investigation, has own investigation procedure based on Supreme Court interpretations and congressional procedural rules. Congress conducts two types of investigation, oversight and special investigations. Oversight investigation is part of the everyday business of the all committees and deals with broader policy issues, while special investigation is temporarily established to deals with high profile executive official's alleged wrongdoings or abuse of power. Although this paper tends to concentrate more on

² Basic Law for the Federal Republic of Germany 1949, Art. 44.1

special investigations, constitutional inherent power, regulations and powers are applied similarly to both investigations. Thus cases and regulations regarding congressional investigation used in this paper are valid in both oversight and special investigation.³ For Mongolian case, although there are some experiences of ad hoc working group with the aim of examining certain incidents, this paper suggests that parliamentary investigation is institutionally and functionally not realized due to lack of sufficient legal background.

Primary resources, national constitutions, statutes, other procedural acts and relevant judicial practices were important resources to my comparison. Many articles and reports were written aspects of the congressional investigation and most of them were available, while resources on German committee of inquiry were very limited in English. Although there is some work on the Bundestag and Congress from comparative angle⁴, particular issue of parliamentary investigation was not enough discussed or outdated.⁵ For Mongolia, except few country reports, assessment by international research report, almost no literature on parliamentary oversight and investigation in English as well in Mongolian. Analyze on Mongolian jurisdiction is based on current legal framework and recent practical example.

As a result of this paper I expect firstly, to establish sound arguments which explains existing parliamentary oversight of the government and *working group* in Mongolian State Great Hural is not an efficient mechanism of democratic accountability comparing to other countries. Secondly, based on the US and German legal frameworks this paper will show what issues should be considered in order to enhance the oversight potential of Mongolian parliament through the parliamentary investigation.

³ Frederick M. Kaiser et al, *Congressional Oversight Manual*. CRS report for Congress, Updated May 1, 2007 p.52 Order Code RL30240

⁴ Uwe Thyssen et al, *The US Congress and the German Bundestag, Comparison of democratic processes*. 1990.

⁵ Although there are some comparative works on the issue, but they were too old to use: Henry W. Ehrmann, *The Duty of Disclosure in Parliamentary Investigation: A Comparative Study*, 1944; The University of Chicago Law Review, Vol. 11, No. 2 (Feb., 1944), pp. 117-153; Fritz Morstein Marx, *Commissions of Inquiry in Germany*, The American Political Science Review, Vol. 30, No. 6 (Dec., 1936), pp 1134-1143

This paper is intended to provide arguments and information for enhancing potential of parliamentary oversight to government by adding the parliamentary investigation; hence I shall not be sure on determining an effectiveness of this instrument in practice. However, this paper tried to substantiate the main hypothesis by analyzing current legal and practical situation of Mongolia and based on the assumption that enhancement of the institutional and legal framework considering comparative good practices, if not fully but certainly influences positively to the intended practical outcome.

Structure of the paper

First chapter addressed the general outline and features of the parliamentary investigation as oversight tool of the executive and its importance. Second part of this chapter tried to analyze the failures and need of enhancement of Mongolian parliamentary oversight and disadvantage of current investigative unit in Mongolian parliament based on the practical examples.

The second chapter, have compared the parliamentary investigation in US and German legal framework by particular issues: constitutional background of parliamentary investigation and what powers it is provided, the extent and limitation of it in relation to other branch, minority right issue in parliamentary investigations. Conclusion provides basic evaluation of the findings of the comparison and general recommendation to the Mongolian parliamentary investigation.

CHAPTER ONE. THE NATURE OF PARLIAMENTARY INVESTIGATION

1.1 The parliamentary investigation as tool of oversight

The Constitutional theory and national constitutional arrangements shows that most parliaments have three basic functions: represent people, make laws and oversee the executive. Oversight function of the parliament is one of the “cornerstones of democracy.”⁶

According to the Inter-Parliamentary union’s research, parliamentary oversight means “the review, monitoring and supervision of government and public agencies, including the implementation of policy and legislation”.⁷

Through the exercise of effective oversight, parliaments can ensure the policies of the government and its legislations implemented accordance with initial intended purpose, examine whether there is an discretionary abuse of power or unlawful and unconstitutional conduct of the executives for the purpose of protection of rights of the citizen, prevent waste of public money with the aim of assuring efficiency of the government actions, and finally to improve the transparency and openness of the government actions by providing public debate.⁸

Although national parliaments have various tools at their hand to exercise oversight, capacity to effective oversight greatly depends on system of government, power relation between two branches and parties within the parliament, and other political incentives.

⁶ Agora, the Portal for Parliamentary Development, <http://www.agora-parl.org/node/1053>

⁷ Tools for parliamentary Oversight, A comparative study of 88 national parliaments, Inter-Parliamentary Union. 2007, p9.

⁸ Bert A. Rockman, Legislative-Executive Relations and Legislative Oversight, *Legislative Studies Quarterly*, Vol. 9, No. 3 (Aug., 1984), p457 also, IPU, World bank, USAID researches all defines the aim of the oversight in identical way.

In countries with presidential systems, “where the constitutionally prescribed separation of powers fosters competition between the legislative and executive branches”⁹ provides greater political incentives and active oversight while in parliamentary states, where executive is formed by the parliamentary majority and supports the government, there is much less incentive for calling executive account coupled due to party loyalty. Therefore “in presidential systems this function will often reside in committees, while in parliamentary systems it is the role of the opposition.”¹⁰

The oversight has become particularly “critical given the enormous powers wielded by executive leaders.”¹¹ With the help of greater possibility to access information and increasing dominance in policymaking, governments have become more powerful. Since it is an unavoidable result of democratic governance, parliaments has to fulfill its oversight effectively. Therefore, national parliaments are increasingly take use of committees of inquiry, which deemed as relatively strong and effective instrument than other oversight tools.¹²

Parliamentary investigation is a strong oversight tool, which mostly deals with failure of the executive, with the task of collecting information and reveals the alleged misconducts in certain event. It is mushroomed throughout the national parliaments irrespective of system of government.

Parliamentary investigation is conducted in permanent or ad hoc committees, composed only by MPs. Permanent committees “serve an investigatory function, either as

⁹ National Democratic Institute for International Affairs (NDI). *Strengthening Legislative Capacity in Legislative- Executive Relations*. Legislative Research Series, (2000) p19.

¹⁰ Center for Democracy and Governance, *USAID handbook on legislative strengthening*, Technical publication series, (2000), p22

¹¹ National Democratic Institute., *Strengthening Legislative Capacity in Legislative- Executive Relations*., 2000

¹² AGORA, the Portal for Parliamentary Development., <http://www.agora-parl.org/node/1053>

part of oversight responsibilities or because the legislature has expressly established a committee just to investigate”¹³ while providing them more power during the investigation.¹⁴

Common way of conducting parliamentary investigation is ad hoc committee of inquiry. These committees of inquiry are specially created by a resolution of plenary of parliament to investigate into specific issues of public concern with fixed duration. Ad hoc committees’ investigation limited to matters specified in the terms of reference of the plenary decision. It is usually smaller than ordinary committees and the principle of equitable representation of parliamentary political groups is maintained¹⁵. According to the IPU survey¹⁶, 76 out of 88 parliaments are equipped with committee of inquiry. These can be either permanent committees or ad hoc committees that are specially created to conduct parliamentary inquiries.

Source of this power to investigate is vested into parliaments by the Constitutions by precise provision, or sometimes with the help of judicial interpretation of other broad provision in the constitution¹⁷, such as general power to legislate¹⁸, or oversight function, right of access to data of public interest¹⁹.

Major differences from other tools are that committees in charge of investigation are usually equipped with more powers than ordinary permanent committees. These powers compel necessary information either by production of document or testifying a witness under oath before the committee and holding responsibility for not complying request. It provides

¹³ National Democratic Institute for International Affairs (NDI), *Committees in Legislatures*. Legislative Research Series Paper #2, (1996) p10.

¹⁴ Tools for parliamentary Oversight, A comparative study of 88 national parliaments, Inter-Parliamentary Union, (2009) p40

¹⁵ Ibid, p41

¹⁶ Ibid, p39

¹⁷ German Basic law, art. 44; The Constitution of The Republic of Albania, Art. 77

¹⁸ U.S. Constitution, Art. I, § 2

¹⁹ Decision of the Constitutional Court, *Magyar Közlöny* (Official Gazette), 2003/126 in “CODICEC” legal database, Venice commission, HUN-2007-M-001, 05-11-2003

more degree of access to information than normal committees, without cooperation of executive. Other tools usually require governmental collaboration.

Parliamentary investigation is mostly conducted regarding the issues which government is reluctant to or refuses to reveal information connected to its own operation or its official's certain behavior, which are usually politically controversial and cannot be decided by other means.

Task of the committee is to scrutinize the work of executive, collect information, disclose the fact and inform to parliament and to society on specific issues of public importance. Therefore inquiries aim to more on lesson-learning rather than punishing or blaming, which is typically the by-product due to its political nature. Committees do not have power to adopt certain decision for further measure by itself on the subject matter, but it may recommend legislative initiative, amendments, future measures in its report.

Although investigative committees have broad powers, they are also restricted by the constitutional principles of separation of power and protection of personal rights.

Interesting question regarding this instrument is its relation to the judiciary. One would ask that isn't that similar powers encroached to the competence of the court. Although committees have more or less similar competences and procedures as judicial proceeding when exercising its investigation, work of investigation committee is restricted to collecting information and making conclusion with effective legislating purpose, not resolving and making decisions as court.

If committee found any breach of law, it may followed by the political responsibility, such as dismissal from the office. Legal responsibility is the matter of judiciary and committee cannot request to commence such procedure, but might sends information.²⁰

²⁰ European commission for democracy through law, Opinion on the Bill on the regulation and functioning of the parliamentary investigation commissions of the republic of Albania, prepared by Sergio Bartole, 2001.

Committee reports and any decisions do not bind courts due to judicial independence and separation of principle. But there can be situation that parliament committee requests information from the court and court refuses to provide it, surely committee cannot compel, thus Constitutional court to decide, as it has jurisdiction under conflicts of competence between powers²¹.

Even though this instrument is widely used in countries irrespective of government system, effectiveness of it varies country to country depending on their legal, political specific characters. For example, regarding the issue of initiating the establishment of ad hoc committee of inquiry, countries have different settings.

Usually, single MP or a minimum number of members can submit a motion to set up an ad hoc committee of inquiry, but actual establishment is decided by majority. Unlike this, in some parliaments, if certain qualified minority demands that the chamber to establish a committee of inquiry, this request obliges plenary to establish committee.²²

Main criticism to a parliamentary investigation is partisanship within the committee. Since committee composed of MPs and decisions made by majority, some are doubtful about its effectiveness. Also, one would criticize it that nothing but making big scandals and gaining popularity and more chance to appear on television or blocking government business without the important merit.

However, proper legislative framework which restricts these by-products, including power balancing possibilities can at least decrease them. In addition, due to the issue of scandalous political controversies, it attracts more attention and debate from public. These wide information and discussion in the society leads to expectation of citizens to make greater change on object of investigation and decisiveness. As noted, “The more important

²¹ Ibid

²² Tools for parliamentary Oversight, A comparative study of 88 national parliaments, Inter-Parliamentary Union, (2009), p42.

thing than the report is that the impact on public opinion which appears some time after the completion of the committee work.”²³

Moreover, qualified team of staff which collects information, organizes necessary services, is essential to effectiveness of investigation, since MPs are also occupied with legislative and other duties.

Strong constitutional adjudication is also needed to make investigation constitutional and effective. When there is dispute between parliament and executive or majority and minority on specific investigation related issues, constitutional adjudication has always been the major umpire.

1.2 The need of parliamentary investigation and current Mongolian legal framework

1.2.1 Parliamentary oversight in the State Great Hural

Mongolian transition to democracy, institutional establishment and political stability deemed as highly successful comparing to the post-communist countries in the region. As declared in the Mongolian constitution, The State Great Hural (Parliament) is a supreme authority in Mongolia. It shall form the government, appoint Prime minister and ministers, dissolve government whenever it pleases, may override presidential veto, may be dissolute by its own vote of two-third of members, or in case of could not appoint Prime minister for certain period of time²⁴. However, in practice, it's not parliament, but ruling majority is very powerful. Indeed, it is an inevitable consequence of parliamentary system of government, but power balance between branches is too much deviated to party politics now.

²³ Rupert Schick and Wolfgang Zeh, *The German Bundestag, Function and Procedure*. 1999 edition., page 43-44

²⁴ See The Constitution of Mongolia, Chapter three, the Structure of the State, 1992

Parliamentary autonomy from executive and oversight function of the parliament, which is very crucial factors for is effective legislating and to balancing party politics deemed as very weak by domestic and foreign surveys, and academics. For example, the Democratic governance indicator noted that although structural horizontal system of accountability is well established in Mongolia, “the independence of these organizations has not been ensured and therefore their activities have had little impact. The ability of the government of Mongolia to develop and maintain an effective system of government responsibility and accountability is a major, possibly the greatest challenge it faces”.²⁵

Another report defines that one of the causes of weak fight with growing corruption in Mongolia, is “the near-absence of the public in substantive policy discussions and oversight of government.”²⁶ Parliamentary committees which are responsible for this function are “largely ineffective in their oversight and monitoring role, lack practical independence, and do not possess adequate technical capacity, including staff with appropriate skill sets.”²⁷ As a part of recommendation, it suggested to build up oversight of government.

Weakness of the oversight is influenced by following backgrounds. After the transition to democracy, “the heavy emphasis was on the passage of legislation and creating institutions over the past years, comparatively little attention has been placed on the oversight function of Parliament, especially holding the Government accountable for the effective implementation of legislation and its regulations.”²⁸

For USAID, the reason of this weak oversight is “lack of transparency and access to information that surrounds many government functions and undermines nearly all aspects of

²⁵ UNDP Mongolia, *Democratic governance indicators: assessing the state of governance in Mongolia*, Follow-up to the fifth international conference of new and restored democracies project, Ulaanbaatar 2006, available at www.icnrd5-mongolia.mn, p30

²⁶ USAID, *Assessment of corruption in Mongolia*, 2005, p4.

²⁷ Ibid at p14

²⁸ Overseas Development Institute, *World Governance Assessment In Mongolia. 2000- 2001*, p4.

accountability by contributing to an ineffective ... government oversight.”²⁹ Perhaps, the only source of information of the parliament is the government, due to inadequate and just formal cooperation between parliament and professional or public interest groups.³⁰ Besides, understanding about oversight and its importance among the politicians as well public very low due to little experience and tradition to control or oversee government.

Moreover, dual office holding in legislature and executive, allowed by constitutional amendments of 2000 also criticized that diminishing oversight of government.³¹ The BTI says that “the disproportionately high number of Cabinet members in the State Great Hural create an environment conducive to undermining the oversight over the executive government by these institutions.”³² Similarly, the DGI concluded that “this amendment and other factors evidence a tendency of undermining the institutions designed to limit the executive power.”³³

Another reason contributing to the weakness is that there is no link between oversight and minority in the parliament. In parliamentary system, it’s obvious that there is less incentive for majority to oversee own government, thus a role of the opposition in the parliament is significant to effective oversight.

We declared several years ago that “...to undertake to work towards more effective parliamentary oversight... shall continue to guarantee a strong committees, parliamentary

²⁹ USAID, *Assessment of corruption in Mongolia*, 2005, p1

³⁰ See Open Society forum of Mongolia, *Supporting the citizen participation in parliamentary decision making process*, Policy research papers. (2006) Available at: www.forum.mn (in Mongolian)

³¹ Although it is a common practice in parliamentary government, together with other factors of Mongolia it becomes problematic. Parliamentary plenary is valid by half of the all seats, which mean 38. Considering the usual very low attendance of MPs and no prohibition or regulation of proxy vote, if plenary convenes by half of members, only 20 votes needed to pass legislation. For now 10 of all 76 MPs are members of the government. In this situation a prominent legal scholar in Mongolia describes it “there is a danger of sliding into the old practice of a parliament being dominated by the executive government”. Chimed B. 2004. *Concept of the Constitution: Common Issues*, Ulaanbaatar. Pp131-132. Now, some argue for middle solutions, which restricts number of dual office holders.

³² Bertelsmann Stiftung, *BTI 2008 - Mongolia Country Report*. Gütersloh: Bertelsmann Stiftung, (2007), p7

³³ UNDP Mongolia, *Democratic governance indicators: assessing the state of governance in Mongolia*, Follow-up to the fifth international conference of new and restored democracies project, Ulaanbaatar 2006, available at www.icnrd5-mongolia.mn, p29

hearings, a role for the opposition and to institute parliamentary procedures and propitious conditions that enable them to participate fully in the decision-making process at all levels in parliament”³⁴, but general picture of the opposition right in the Mongolian parliament seems very limited.

Parliamentary opposition is provided some possibility to express their position in legislative work, but “it has limited opportunity to exercise oversight or exert constructive influence on the policies and activities of the executive government.”³⁵

Legal instruments in the hand of minority are except chairing the certain committees³⁶, nothing but slowing down working of parliament. Once certain matter have decided in the parliament without considering minority position, there is very limited ex post oversight tools.

This shortcoming of check power of the opposition, contributes to minority parties in the parliament to choose to collaborate and enter into coalition government, instead of being opposition. Indeed, political consensus is might be good for the effective legislating; but it is eliminating competing voices in the policy making in Mongolian situation. Oversight should not be consensus, especially when the issue is corruption and abuse of powers or protection of human rights. “Mongolian parliamentary system can be truly competent only if there is a significant opposition to check the action of the majority and its cabinet.”³⁷ All these circumstances together contribute to the weak oversight of the parliament and diminishing democratic accountability.

³⁴ Ulaanbaatar Declaration, Parliamentarians' forum on the occasion of the Fifth Conference of New or Restored Democracies, Ulaanbaatar (Mongolia), 2003, available at <http://www.ipu.org/Splz-e/ulanbtr.htm>

³⁵ UNDP Mongolia, *Democratic governance indicators: assessing the state of governance in Mongolia*, Follow-up to the fifth international conference of new and restored democracies project, Ulaanbaatar 2006, available at www.icnrd5-mongolia.mn, p27

³⁶ The Law on State Great Hural of Mongolia, Art. 24.9. Chairs of the subcommittee on budgetary expenses and ethics of parliamentarians shall be minority party MP.

³⁷ Dashnyam, Enhnasan, *The parliament of Mongolia in the 1992 Constitution: Origins and effectiveness of the parliamentary model*, 2006. p48

In this situation, in order to strengthening parliamentary oversight function effectively, it's crucial that existing institutional and legal framework of the parliament "ensures that the position of the parliament as an oversight institution and guarantees its powers and independence within the political system."³⁸ Parliamentary investigation through its committees which will "give them the capacity to conduct inquiries that reach the heart of the government"³⁹ deemed as one of the good practice.⁴⁰

Therefore, in this context, to enhance oversight function of Mongolian parliament, effective the parliamentary investigation may be needed as suggested by comparative materials and general tendency. Before turn into comparison, let's assess the current potential of parliamentary investigation in Mongolian parliament.

1.2.2 Parliamentary investigation in the State Great Hural

According to the Inter-Parliamentary union database, Mongolian parliament has committees of inquiry to check and oversee the executive workings.⁴¹ Another research on Mongolia also mentioned that Standing committees have a right to request to SGH to establish ad hoc special Working Groups to address specific issues.⁴² However, the closer look at legal background and practical examples of the working group comparing to the general tendency of parliamentary investigation that we have seen in previous part makes us to rethink this conclusion again.

In the Law on of State Great Hural (SGH), there are several provisions which might be interpreted as legal basis of parliamentary investigation. According to the law, there are 3

³⁸ Agora, the Portal for Parliamentary Development., <http://www.agora-parl.org/node/1053>

³⁹ Agora, the Portal for Parliamentary Development., <http://www.agora-parl.org/node/1053>

⁴⁰ David Beetham, *Parliament and democracy in the twenty-first century: a guide to good practice*, Inter-Parliamentary Union , 2006, p128

⁴¹ Inter-Parliamentary Union, *Parline Database on national parliaments*, available at <http://www.ipu.org/>

⁴² USAID, *Assessment of corruption in Mongolia, Final report*, 2005, p14 available at: <http://www.usaid.gov/mn/documents/mongoliacorruptionassessmentfinalreport.pdf>

different type of committee within the SGH: standing committee⁴³ and sub-committee⁴⁴ are in permanent base, and temporary committee⁴⁵, which enjoys same right as standing committee⁴⁶. In addition, there are two types of “a working group”. One is established by the Speaker of the SGH and chairs of standing and subcommittees on own relevant subject matter, with aim of “performing the State Great Hural’s oversight function”⁴⁷, whereas another is for working out and drafting new legislations and other policy papers⁴⁸. While three committees shall be composed only of MPs, this working groups may composed of external experts in addition to MPs.

First presumption of legal basis of parliamentary investigation in Mongolia is the temporary committee. Its function is uncertain from legal provision. It says this committee will work with the “purpose of working out and solving certain issues and submit for the consideration of the SGH.”⁴⁹ But current practice shows that rather than oversight, it usually exercises more legislative function, established to work out on new policy issues, draft statutes. For example, there are temporary committees on rural development; on city construction and capital city etc in current parliament. Therefore it is not legal base for investigation.

⁴³ The Law on State Great Hural of Mongolia, Art. 19.2.7. Standing committee is basic unit of procedure of the SGH, apart from its legislative function, and main body responsible for monitoring and overseeing implementation of regulations in the relevant field. It equipped with right to “receive documentation such as surveys, reports, conclusions, proposals, information papers and assessments with reference to issues on the State Great Hural session agenda, and to implementation of laws and resolutions from relevant organs and officials and to hear their reports”

⁴⁴ Ibid, Art. 24.5 Sub-committees work within the standing committee and carry out certain part of the subject matter of standing committee. For example, legal committee has human right sub-committee. It shall exercise similar competence as standing committee. Moreover, “on issues of their scope of work, Sub-committees exercise rights to conduct examination and survey, get relevant information, get explanation from concerning organizations, officials and citizens, carry out scrutiny via its own and joint working groups, and pass resolutions, submit it for discussion of the Standing Committees or to the SGH plenary session in addition to its legislative function

⁴⁵ Ibid, Art. 25.

⁴⁶ Ibid, Art. 25.3

⁴⁷ Ibid Art. 19.2.8.

⁴⁸ Ibid Art., Art. 11.1.15

⁴⁹ Ibid, Art. 25.1.

General power to oversight, including some sort of inquiry function vested in the standing and sub-committee within it. However, in practice, when there is need of scrutiny or examination of certain facts, committees mostly set up working groups and do it through this. Thus the only unit in the SGH, which does the investigation, is the working group. The working group's function is described in the law that "to scrutinize implementation of law and other parliamentary decisions with view of concluding report and recommendation."⁵⁰ But there is no other provision in the law or no special rules about competence and procedure of it to do this scrutiny. Working groups, which is established within the standing and subcommittee, we can interpret law that as part of committee works, they have similar rights. But in case of working groups which established by the Speaker and outside the committee, rights are not clear in the law. We can discuss practical outcome of these working groups as revealed in recent examples of parliamentary oversight works.

12 months after post election state of emergency⁵¹, two separate bodies of the State Great Hural of Mongolia (parliament) have started inquiry into this incident. Due to the annual report of the Human Right Commission, which recognized a mass human right violation during the state of emergency, especially in the arrest, detention and further prosecution of protestors, and still ongoing public controversies and debate, The Human Right sub-committee of SGH, chaired by the opposition party member, announced that it establishes working group to investigate this issue. Just after it started working, with initiation of majority party, the Speaker of the SGH established the another working group,

⁵⁰ Ibid, Art. 33.11

⁵¹ On 1st of July, 2008, after the Mongolian People's Revolutionary party, the successors of former communist party declared their victory in the parliamentary election, thousands of people had started protest claiming that the ruling party has defrauded the election result. Protest became relatively violent and President declared the state of emergency and thus allowed to use force against protesters. During the police operation, 5 people were killed and hundreds were injured and arrested. Emergency continued 4 days and domestic and foreign human right organizations, later the Human right commission of Mongolia were expressing their concern about human right violation and cruelty of police operations and court during and after the 4 day emergency. Afterwards, almost two hundreds, including juveniles were tried in criminal court for attending the robbery, theft and firing the main building of ruling party. Most of them are now released due to new amnesty law.

with the aim of studying the legality of the declaration of the state of emergency on July 1, 2008 and also evaluate the performance and liaison of the law enforcement agencies at the time of the emergency.

Working group of Human right subcommittee collected petitions from victims, human rights NGOs, requested evidences from police, prosecutors and courts. Open hearing was also held by the subcommittee for the first time in the SGH, which took testimonies from victims and state agencies, allowed citizens to attend and observe, and broadcasted by channels other than National Broadcast television.

The other working group was permitted full access to all confidential state documents and called and heard former President and Prime minister, both are from present ruling party. But all procedure was closed to the public for the reason of state confidentiality, without giving any explanation why it is deemed so.

Both working groups' operations have not finalized yet and report also has not been submitted to plenary. It will be not surprising that both working groups' findings contradict with one another's.

Although both groups legally lacked in clear grounds for competence and power, situation of them was different. According to the Law on SGH, all committees, (probably working groups within the committees) has a right to receive information from other sources, but there is nothing about what will happen if executive or someone does not complying the request, no possibility to use legal responsibility for this.

During the human right sub-committee group's work, several difficulties were emerged⁵². As a result of not clear cut power, police did not give records of video cameras to working group; prosecutor office did not appeared in the hearing, court has refused to

⁵² The interview with Mr. Temuujin Khishigdemberel, a chair of the Human Right subcommittee of the SGH of Mongolia, Jan, 2010.

cooperate with committee work. Also, because of insufficient regulation regarding the formation of committee, there is no rule prevents a former minister of legal affair, who was in charge of the police operation during the emergency, to involve in working groups inquiry and voting on a report of the inquiry in future as he is now member the Human right subcommittee.

Attempts were made from the majority to add and change the subject matter of investigation with intention of blurring and hindering the working group the outcome. Budget and special stuffs were not provided for the operations of the working group⁵³. Furthermore, there is no regulation regarding witness and other legal procedural requirements, no procedural regulation does not apply here. Witness is not provided any protection and there is no legal responsibility for the testimony. Moreover, this working group criticized mostly from the majority, saying that subcommittee to judging the judiciary.

Lack of cooperation of government agencies caused by mostly because this work is against the structure backed up by ruling party. In contrast, the majority investigation was in much different shoes. It provided power to access materials and organizations willingly cooperated. Although the issue of both groups deserves much deep inquiry and attracted great attention of the public, these group's works have been impaired by ambiguous and insufficient legal background and closed door in addition to political obstacles.

Moreover, the statistical survey⁵⁴ on past working groups referred under the term "working group" to all oversight forms of actions, including groups with external expert involvement, working groups under budgetary issues and foreign policy, even introductory field visits to state organizations in addition to investigatory work. The survey shows that 30 percent of all 244 working groups established so far since 1996, have not submitted their final

⁵³ Ibid

⁵⁴ State Great Hural Secretariat, Center for research, Policy research series, 4th Edition, Ulaanbaatar, (2010) p312

report. They simply did not work or no information of their completion of the examination. Perhaps reason for this insufficient number is lack of legal requirements that restricts party politics as above and pushes to more accountability.

Seeing that above mentioned drawbacks of the working groups and more importantly, a lack of legal power to compel evidences, for now, I conclude that working group experience in the SGH is not parliamentary investigation. This working group is certainly one form of everyday business of committees to fulfill its oversight function, but it is not qualifying the specific characters of the parliamentary investigation.

Conclusion: As we have seen, current parliamentary oversight potential in Mongolia parliament fails due to negligence of its importance and too much power deviation to party politics. Existing tool, replacing the parliamentary investigation, which should be the strong tool for hold executive into account, is not provided necessary power and regulations. Considering the reasons of failure of the oversight in Mongolia, there is a need of a tool that provides power balance through the minority right and enhances parliamentary autonomy from executive, and improves transparency to the public. My hypothesis for this tool is the parliamentary investigation in proper sense.

CHAPTER TWO. COMPARATIVE LEGAL ANALYSIS ON PARTICULAR ISSUES

2.1 Constitutional background of the parliamentary investigation

There is no explicit provision in US Constitution about Congressional oversight or investigative power over executive branch. But over the 200 years, by interpreting more general provisions, the various Supreme Court decisions has established and supported investigative power of Congress.

First one of these provision is Article I, clause 1 of the US Constitution which states "All legislative powers herein granted shall be vested in Congress". Next source is the impeachment power⁵⁵ of the legislature stated in the Constitution. "The impeachment power grants Congress the power to remove the executive, implicit in this is the authority to conduct investigations."⁵⁶ Finally, so-called "necessary and proper clause"⁵⁷ of the Constitution provides the legislature the power to create the tools which would help to perform its function.

Fundamental and the most cited decision in this regard are *McGrain v. Daugherty* (1922), *Watkins v. United States* (1957). The case of *McGrain v. Daugherty* challenged Mr. Daugherty's contempt conviction for refusing to appear before the investigation committee. Upholding the conviction, the Court affirmed that general power to legislate includes the power of inquiry. While invoking the implied power of the Congress, saying although the Constitution not clearly granted to the Congress, "there are certain auxiliary

⁵⁵ U.S. Const. Art. I, § 2 states that "the House of Representatives. . . shall have the sole power of impeachment" and Art. I, § 3, cl. 6 grants the Senate "the [*3] sole power to try all impeachments".

⁵⁶ The 1992–93 Staff of the Legislative Reference Bureau, *An Overview of Congressional Investigation of the Executive: Procedures, Devices, and Limitations of Congressional Investigative Power*, 1 Syracuse J. Legis. & Pol'y. 1, 1 (1995) p2

⁵⁷ U.S. Const. Art. I, § 8 states that "the Congress shall have power to... make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers..."

powers that are necessary and appropriate to make the express powers effective”⁵⁸, the court declared that “the power of inquiry with process to enforce it is an essential and appropriate power to the legislative function and has long been treated as an attribute of the power to legislate.”⁵⁹

Because “in order for Congress to pass legislation for the sake of the public, Congress needs to have the ability to inquire into problems confronting society, analyze the possible solutions, and agree upon the proper method of action. Without the innate ability to conduct the most basic of investigations, the basic power to legislate would be rendered ineffective.”⁶⁰

In addition to recognizing the Congressional inherent power to conduct investigation, The Court in *Watkins v. United States*, articulated the scope of the Congressional investigation while striking down the contempt conviction on the ground of lack of pertinence. Court stated that “That power is broad. It encompasses inquiries concerning that administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic, or political system for the purpose of enabling the Congress to remedy them.”⁶¹ Besides, court emphasized that this power applies to investigate conducts of the executive: “It comprehends probes into the departments of the Federal Government to expose corruption, inefficiency or waste.”⁶²

However, this decision also asserts the limitation of the investigation. Adhering the principle established in early case of *Kilbourn v. Thompson* which stated that “A Congressional investigation into individual affairs is invalid if unrelated to any legislative

⁵⁸ *McGrain v. Daugherty*, 273 U.S. 135 (1927)

⁵⁹ *Ibid*, 273 U.S. 174 (1927)

⁶⁰ The 1992–93 Staff of the Legislative Reference Bureau, *An Overview of Congressional Investigation of the Executive: Procedures, Devices, and Limitations of Congressional Investigative Power*, 1 *Syracuse J. Legis. & Pol’y*. 1, 1 (1995) p2

⁶¹ *Watkins v. United States*, 354 U.S. at 178, 187 (1957).

⁶² *ibid* at 178, 187

purpose, because it is beyond the powers conferred upon Congress by the Constitution.”⁶³ Court affirmed that “Congress is the neither law enforcement nor trial agency... No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress.”⁶⁴ Moreover, “an investigating committee has only the power to inquire into matters within the scope of the authority delegated to it by its parent body.”⁶⁵

But it is hard to challenge that whether investigation connected to legislative purpose. The court of *Eastland v. United States Servicemen's Fund* held that, to be legitimate, Congressional investigation is not examined by Congress' motives for initiation an investigation⁶⁶ and also there is no need to an investigation leads to actual legislation⁶⁷.

In contrast with US Congress, German Basic law provides clear constitutional basis for parliamentary investigation. In Bundestag, parliamentary investigation is carried out by special committee of inquiry. From the Basic law, we can see that committee of inquiry established by not all committees of the parliament, which is the case in US Congress, but plenary Bundestag. It is an ad hoc independent committee, with special power and procedure than other committees, to take the necessary evidence at public hearing. Mostly, the committee of inquiry established to investigate on possible abuses of power in government and administration or suspected misconduct of politicians, and officials.

According to the Basic law of Germany, committee of inquiry may be established by general procedure, stated in the article 44 or by defense committee declaring itself as a

⁶³ Kilbourn v. Thompson, 103 U.S. 168 . P 198 (1881)

⁶⁴ Watkins v. United States, 354 U.S. 178, 187 (1957)

⁶⁵ Ibid at 178, 187 (1957).

⁶⁶ See *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 508 (1975); (In determining the legitimacy of a Congressional act, court do not look to the motives alleged to have prompted it)

⁶⁷ See *Eastland*, 421 U.S. at 509 ("Nor is the legitimacy of a Congressional inquiry to be defined by what it produces... To be a valid legislative inquiry there need be no predictable end result.").

committee of inquiry provided in the article 45. The article 44 provides two possible way of initiation of inquiry.

Bundestag has no right to decide, but obliged to set up a committee immediately when the qualified minority, one quarter of the members of the Bundestag, requested a motion to plenary. Otherwise, whether to establish the committee is decided by majority vote of the members of the Bundestag.⁶⁸

When convening committee of inquiry, the Bundestag shall take into account that whether the subject matter of the inquiry within the scope of its competence⁶⁹ horizontally and vertically. Particularly, the principle of subsidiary and separation of power should be maintained. Inquiry shall not be conducted on the issues of Landers of the Federation and European Parliament since they provided own committees of inquiry.⁷⁰ Nor committee encroaches the “core area of executive responsibility”, which is current day-to-day workings of the government and legitimate state secrets⁷¹. Thus the committee can be established only to investigate into already completed acts of government⁷². But these limitations are enforceable in the court when initiation of the committee was motion of qualified minority. Basic law also provides the fundamental principles of the working of committee such as open and lawful evidence taking procedure, and its relation to judiciary and administration in the article 44.

In addition to general rule of establishing committee of inquiry, the Basis law provides that only defense committee has special status that it can constitute itself as a committee of inquiry at any time in order to ensure effective parliamentary scrutiny of the

⁶⁸ Basic Law for the Federal Republic of Germany 1949, Art. 44.1

⁶⁹ German Bundestag, Research Papers, No. 30/09 (March 27, 2009), *Committees of inquiry*, available at: <http://www.Bundestag.de/dokumente/analysen/2009/untersuchungsausschuesse.pdf>

⁷⁰ Ibid

⁷¹ Ibid

⁷² Ibid

armed forces without plenary parliamentary decision⁷³. When defense committee convenes itself an inquiry committee, it should apply general procedure as ordinary committee of inquiry established by 44.1 of the Basic law. But the Basic law and the Act Governing the Legal Framework for Committees of Inquiry of the German Bundestag, provide some special exemptions due to defense committee's particularity. For instance, basic law states that Article 44.1, specially the principle that taking of evidence in public does not apply to defense matters.⁷⁴ There are the constitutional court cases, which describe this provision of the Basic law, especially connected to minority right and limitation of the committee. Following parts of the paper will discuss them.

The constitution of Mongolia provides no clear provision on parliamentary investigation. It tells us that the SGH shall have standing committees⁷⁵. General oversight function of the SGH is based on the provision of the Constitution, states that "[the SGH has power] to supervise the implementation of laws and other decisions of the State Great Hural."⁷⁶ Also in the Constitution, there is a provision which states the SGH may has other powers if it is defined by law.⁷⁷ Based on these provisions, the law on the SGH provides that all committees may establish "working group" with oversight function. Therefore, if committees establish this group, it has to be connected with certain law implementation or at least phrased in a way that checking the implementation of certain laws or other decision.

To conclude for this part, in comparing parliaments, investigation is rooted in the constitution either by explicit provision or implied power. In Germany, the ad hoc committee of inquiry is a special body of Bundestag with aim of collecting crucial information in public

⁷³ Basic Law for the Federal Republic of Germany 1949, 45.2

⁷⁴ Ibid, Art. 45.3.

⁷⁵ The Constitution of Mongolia 1992, Art. 28

⁷⁶ The Constitution of Mongolia 1992, Art. 25.1.8

⁷⁷ The Constitution of Mongolia 1992, Art. 25.4

hearing, while in US Congress all committees are empowered to conduct investigation as long as it has legislative purpose. In Mongolia, constitution provides general oversight function, and there is no clear interpretation by the Constitutional court or academic literatures that it implies investigative power of the parliament as in the US. But in case that parliament decides to provide itself power to investigate it will not conflict with the Constitution provided that there is a general oversight provision together with possibility to have additional power by laws.

2.2. Powers of the investigative committees

The main feature of the parliamentary inquiry is that committees doing investigation provided subpoena – a power to compel information either in the form of testimony and producing documents. If witness or executives fails cooperate, there is enforcement power to punish them. As noted in the US case, “experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed”⁷⁸. We will discuss in this part about procedural powers of investigation committees such as subpoena, and legal consequences of not complying it.

2.2.1 Power to compel evidence

The subpoena is an implied power of the Congress recognized in the judicial interpretation of the US Constitution. “The issuance of a subpoena pursuant to an authorized investigation is an indispensable ingredient of lawmaking.”⁷⁹ Subpoena can be exercised as tool for both legislative or oversight function by all Senate and House committee. Subpoena

⁷⁸ The 1992–93 Staff of the Legislative Reference Bureau, *An Overview of Congressional Investigation of the Executive: Procedures, Devices, and Limitations of Congressional Investigative Power*, 1 Syracuse J. Legis. & Pol’y. 1, 1 (1995) p3

⁷⁹ Eastland v. United States Servicemen’s Fund, 421 U. S. 505 (1975)

issued in any committee “have the same authorities as if they were issued by the entire House of Congress from which the committee is drawn.”⁸⁰ Committees have a statutory power to require the attendance and testimony of witnesses and the production of documents regarding matters within the committee’s jurisdiction.⁸¹ In special investigation, committee must be specifically delegated that authority by Senate or House resolution.⁸²

To issue subpoena, House and Senate rules require a majority vote by a quorum of the committee membership, unless the committee adopts a rule delegating to its chair the authority to issue subpoenas⁸³.

Federal courts give great deference to Congressional subpoena if it was issued for “a valid legislative purpose” and was part of the “deliberative and communicative processes”⁸⁴. The Supreme Court held that “the Speech or Debate Clause of the Constitution provides that these legislative activities, including subpoenas are absolutely protected from judicial interference”⁸⁵. Therefore witness refuses to testify or produce papers to a committee, the only way to object subpoena is not comply the request with risk of contempt citation and then contest contempt on the ground that subpoena was unlawful.⁸⁶

To issue subpoena properly the committee has to be authorized to do investigation on subject matter by Congress resolution or enabling rule, whether there is legislative purpose, and pertinence, a test provided in *Wilkinson v. United States*.⁸⁷

⁸⁰ McGrain v. Daugherty, 273 U. S at 174-75.

⁸¹ Senate Rule XXVI (1) and House Rule XI(2)(m)(1).

⁸² Morton Rosenberg, *Investigative Oversight: An Introduction to the Law, Practice, and Procedure of Congressional Inquiry* 3 (Cong. Res. Serv., CRS Report for Congress, Order No. 95-464 A, Apr. 7, 1995), p24

⁸³ The 1992–93 Staff of the Legislative Reference Bureau, *An Overview of Congressional Investigation of the Executive: Procedures, Devices, and Limitations of Congressional Investigative Power*, 1 Syracuse J. Legis. & Pol’y. 1, 1 (1995), p6

⁸⁴ Louis Fisher, *Congressional Investigations: Subpoenas and Contempt Power*, (Cong. Res. Serv., CRS Report for Congress, Order Code RL31836, Apr. 2, 2003) p7

⁸⁵ Eastland v. United States Servicemen’s Fund, 421 U.S. 491, 503-07 (1975)

⁸⁶ Morton Rosenberg, *Investigative Oversight: An Introduction to the Law, Practice, and Procedure of Congressional Inquiry* 3 (Cong. Res. Serv., CRS Report for Congress, Order No. 95-464 A, Apr. 7, 1995) p5

⁸⁷ Ibid, p5, *Wilkinson v. United States*, 365 U.S. 399, 408-09 (1961)

The Committee of inquiry in German Bundestag also provided by subpoena power through constitutional adjudication and relevant statute similar to US Congress committee. The Constitutional court held that “to make committee more effective, the committee’s constitutionally granted power to the necessary evidence in analogy with the rules of criminal procedure, also entitles the committee to compel testimony, to request order of arrest from competent court against witness.”⁸⁸ As a rule, this subpoena shall be issued within the object of the inquiry and subject to constitutional limitation⁸⁹.

“The heart of the right to conduct investigation”⁹⁰ is the right to examine government documents and hear testimonies from government officials and civil servants under oath. The Federal Government is obligated to grant necessary permit to its official called as witness to testify.

In Mongolian legal framework, there’s no exact provision on the law providing what powers do “working group” exercise in order to fulfill their task. But considering that this unit established within the standing and sub-committee, we can argue that “working group” shall exercise similar power to committees. As a general tool for oversight, the standing and subcommittees provided statutory “right to obtain information, ask explanations, conducting examinations and surveys”⁹¹. But they are not compelling; there is not measurement to enforce this right in the Law. Thus they are not subpoena. In practice, though it’s not always the case, but is issues such as we seen in previous part, which are politically controversial and especially question directed to their misconduct, executive official can ignore parliamentary committee request for providing evidence without any liability.

⁸⁸ Lappas– BVerfGE 76, 363-394

⁸⁹ Act Governing the Legal Framework for Committees of Inquiry 2001, Art. 18.

⁹⁰ Winfried Stefanni, *Parties and committees in the Bundestag* in the “US Congress and the German Bundestag, Comparison of democratic processes”. (1990) p280-281

⁹¹ The Law on the State Great Hural of Mongolia 2006, Art. 25.4

2.2.2 Enforcement power of the committee

As a tool for enforcing demands for information by the threat of punishment, contempt is used as an important feature to the Congressional investigation. If witness does not comply with committee's subpoena, refusing to appear before committees, to respond to questions, or to produce documents, that person may be subjected to Congressional contempt procedure. Although there is no clear provision giving this power to Congress, the Supreme Court's early interpretation in 1821 provides that "without the power to punish for contempt, the House would be left "exposed to every indignity and interruption that rudeness, caprice, or even conspiracy may mediate against it."⁹²

Both Senate and House may cite a witness for contempt under their *inherent contempt power* or under a *statutory criminal contempt procedure*⁹³. According to the inherent contempt power, offended chamber enforce the procedure by its own officials, arrest and try witness before it, and can imprison him.⁹⁴ But because of its complicated trial and time consuming proceeding, Congress enacted a statute⁹⁵ providing for criminal process in the federal courts with fine to imprisonment penalties for contempt of Congress in 1857 as a "supplement to inherent power"⁹⁶. Under the statute, the offended house votes to cite the offender for contempt and then certifies the citation to the U.S. Attorney for prosecution.⁹⁷

Third option is provided to the Senate, a statutory civil contempt procedure, which the federal district court is to issue an order to a condemner to comply with a subpoena upon

⁹² Anderson v. Dunn, 19 U.S. (6 Wheat) 204 (1821).

⁹³ Morton Rosenberg, *Investigative Oversight: An Introduction to the Law, Practice, and Procedure of Congressional Inquiry* 3 (Cong. Res. Serv., CRS Report for Congress, Order No. 95-464 A, Apr. 7, 1995) p11

⁹⁴ Ibid, p12

⁹⁵ 2 U.S.C. §§192 and 194

⁹⁶ In re Chapman, 166 U.S. 661, 671–672 (1897).

⁹⁷ Michael A. Zuckerman, *The Court of Congressional Contempt*, 25 J. L. & Politics 1, (2009) p2

application of the Senate and if witness still refuses he may be tried for contempt of court, with sanctions being imposed to coerce his compliance.⁹⁸

In addition to the contempt, as an enforcement of investigation, there is a criminal charge for an intentional false statement pertinent to the subject matter of the investigation or false statement which is “capable of influencing the committee” under the oath. These provisions are codified at criminal law⁹⁹.

The Basic law of the Germany states that criminal procedural applies to the evidence taking and testifying¹⁰⁰. As an enforcement **the statute** further states that if witness without any excuse not appeared before the committee to give testimony, the committee has right to fine him or her and arrange their compulsory attendance.¹⁰¹ If witness still refuses to testify, the committee can have persons taken into custody. Similar to the case of court proceedings, false testimony before a committee of inquiry is a punishable offence.¹⁰²

As mentioned in previous topic, no contempt power or any legal responsibility for not complying working group’s request to providing evidence in Mongolia.

Conclusion: Congress and Bundestag both have subpoena and power to punish for not complying committee request. Both countries apply criminal laws or own measures as contempt for the enforcement, imposing responsibility to witness who refused to appear without reason. Also in both jurisdictions, general responsibility for perjury under criminal law applies to the investigation. But in Mongolian parliament the main character of investigation is missing. The compelling right and legal threat for not complying parliamentary oversight means do not exist in Mongolian background.

⁹⁸Morton Rosenberg, *Investigative Oversight: An Introduction to the Law, Practice, and Procedure of Congressional Inquiry* 3 (Cong. Res. Serv., CRS Report for Congress, Order No. 95-464 A, Apr. 7, 1995) p11

⁹⁹ 18 U.S.C. § 1621 and 22 D.C. Code § 2501

¹⁰⁰ Basic Law for the Federal Republic of Germany 1949, Art. 44.2

¹⁰¹ Act Governing the Legal Framework for Committees of Inquiry 2001 Art. 21.27

¹⁰² Uwe Thyssen et al, *The US Congress and the German Bundestag, Comparison of democratic processes*. 1990. p

2.3 Limitations of compulsory power of parliamentary investigations

There are certain personal rights and official privileges usually affected by the compulsory power of the investigation committees and limit the committee's right to obtain testimonies from witnesses and official files even they are within its subject matter and power conferred by its mandate. These are the executive privilege or interest which gives some possibility to withhold information from parliament and personal rights which shall be maintained in all legal procedures.

Insofar in Mongolian legal framework, there is no compelling power to the SGH connected to investigation, thus nothing about restriction the compelling powers. Therefore this part discusses the issue in US and German jurisdictions.

2.3.1 Executive privilege in Germany and US:

Although there is no clear limitation to the Bundestag right to investigate over executive, the Federal constitutional court interpreted the principle of separation of powers in the Basic law as restriction to the investigation. Court held that "the committee of inquiry may not investigate into what it called the core area of executive responsibility which includes, in particular, evidence relating to the current day-to-day workings of the government and legitimate state secrets."¹⁰³ However, interpretation of above restrictions is always disputable and not in the scope of both branches, therefore the court has jurisdiction over this.

Court held that "the executive privilege, extended only to ongoing processes and not the past."¹⁰⁴ Because the investigation intended for lesson-learning would be ineffective if parliament cannot access already completed matter. In the same case, Court also asserted that

¹⁰³ Flick – BVerfGE 67, 100-146

¹⁰⁴ BVerfGE 69, 34. As cited in Volker Röben., *Federal Constitutional Court Defines the Power of Parliamentary Minorities in the Constitutionally Established, Parliamentary Investigative Committees*, German Law Journal Vol. 3 No. (2002).

this implicit executive's privilege not to disclose confidential or sensitive information, evidences subpoenaed by an investigative committee is narrowly interpreted¹⁰⁵. Government can invoke this only when disclosing the materials and granting permission would impair the interest of federation and Landers or seriously jeopardize or impede the its performance of public function¹⁰⁶.

More recently constitutional court once again discussed what circumstances government can withhold the information from the committee in inquiry under the “core area of the executive responsibility.” Following the massive media reports on the issue of the German intelligence service activities connected to Iraq war, Bundestag established the committee of inquiry by the plenum upon the motion of qualified minority. During the investigation government officials as witnesses refuse to testify on the ground that they have limited permission granted and several times refused to relevant files to the committee. Court decided that “the limited permit to testify and refusal to submit files, requested by the committee, the government breached the right of the German Bundestag to obtain information and investigate pursuant to Article 44 of the Basic Law”.¹⁰⁷ Government sweeping claim under the core area of executive responsibility and state interests is not sufficient enough to substantiate why the disclosing of the files relevant to security.¹⁰⁸

Court stated that “the core area of executive responsibility is affected when there is “risk that the government’s ability to function and the responsibility before the people”¹⁰⁹ will be impaired by this restrictive disclosure. Since this two conflicting interest are both

¹⁰⁵ BVerfGE 67, 100 cited in David P Currie, *Separation of powers in the Federal republic of Germany*. The American Journal of Comparative Law, Vol. 41, No. 2 (Spring, 1993), pp 201-260, in footnote no. 166

¹⁰⁶ Herman J. Schreiner, Susanne Linn, *German Bundestag function and procedures*. 16th electoral term. 2006 edition. Page no. 41

¹⁰⁷ “Limited grant of permission to testify and refusal to surrender documents to BND committee of inquiry partly contrary to constitutional law”. Federal Constitutional Court - Press office, Press release no. 84/2009 of 23 July 2009 about 2 BvE 3/07.

¹⁰⁸ Ibid.

¹⁰⁹ 2 BvE 3/07 cited in the Summary on BvE 3/07 decision in “Codices” legal database, Venice commission , GER-2009-2-008.

founded in the separation of power, and restricted by the principle, court uses the weighing test on a case-specific basis. The balancing test of the court is “the deeper a parliamentary request for information penetrates the core of the government’s formation of intent, the more important has to be the parliamentary request for information in order to prevail against the interest in confidentiality invoked by the government.”¹¹⁰ If committee requires the information relating to potential breach of law or comparable wrongdoing of the government, its interest gets more weigh¹¹¹. Therefore, government refusal against this important right shall accompany “substantiated reasoning” to overcome it.

Second restriction of parliamentary right is state or Lander interest connected with national security and secrecy concern. But mere statement that materials required by the committee are classified or disclosure would jeopardize state interest is not enough. Considering the state interest is also the matter of parliament as well government and “enhanced organizational precautions within the committee to handle information”, “if documents are to be withheld from a committee of inquiry on the basis of Article 44.2 sentence 2 GG, the requisite grounds not only have to specify the extent to which the information is based on an encroachment on Article 10 GG, but also have to substantiate why the information obtained is subject to a ban on utilization by the committee.”¹¹²

When US Congressional investigation concerns the government actions, president and his administration against compulsory powers of the committee always invoke “executive privilege” either to refuse subpoena or to challenge contempt. This doctrine about privilege

¹¹⁰ Ibid

¹¹¹ Limited grant of permission to testify and refusal to surrender documents to BND committee of inquiry partly contrary to constitutional law”. Federal Constitutional Court - Press office, Press release no. 84/2009 of 23 July 2009 about 2 BvE 3/07

¹¹² Ibid

has long historically and constitutionally rooted as Congressional investigation.¹¹³ Executive privilege “facilitates national security, and protects the President in his discharge of constitutional duties by guaranteeing the confidentiality of sensitive executive documents”¹¹⁴. This privilege can only be invoked by president himself, or also upon the request of executive agency he may do so.¹¹⁵

Although, it’s very rare that government officials reject the Congressional investigative power nowadays, there is possibility to clash this with executive privilege. Few cases brought before the lower courts but, courts usually hesitant to decide on merit, suggesting compromise between Congress and executive.¹¹⁶

The executive privilege is judicially recognized in *US v. Nixon*¹¹⁷ in the US Supreme Court, but at the same time court asserted that “it is not absolute” and established that there can be balancing test when executive privilege and other branch’s interest overlaps.

The case of *Senate Select Committee on Presidential Campaign Activities v. Nixon*¹¹⁸ takes this issue into the Congressional investigation situation. Nixon again refused to hand records to the investigation committee. Appellate court held that “to overcome the presumptive privilege of presidential confidentiality, any other branch of government must present a strong showing of need”¹¹⁹, therefore in this case, Congress has to sufficiently

¹¹³ See J. J. Richard Broughton, *Paying Ambition's Debt: Can the Separation of Powers Tame the Impetuous Vortex of Congressional Investigations?*, 21 Whittier L. Rev. 797. (2002) p6-7

¹¹⁴ Kalah Auchincloss, *Congressional investigations and the role of privilege*, 43 Am. Crim. L. Rev. 165, winter, (2006) p13

¹¹⁵ Morton Rosenberg, *Investigative Oversight: An Introduction to the Law, Practice, and Procedure of Congressional Inquiry 3* (Cong. Res. Serv., CRS Report for Congress, Order No. 95-464 A, Apr. 7, 1995), p24

¹¹⁶ Ibid p14

¹¹⁷ *US v. Nixon*, 18 U.S. 683 (1974) This case basically considered conflict between judiciary and president, court limited the scope, affirming “the supremacy of each branch within its own assigned area of constitutional duties” and in the separation of powers” but “the privilege is not absolute, precluding judicial review whenever it is asserted”.

¹¹⁸ *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir.1974)

¹¹⁹ Given that the House Judiciary Committee already possessed subpoenaed copies of the tapes, the Senate's need was merely cumulative, and therefore not [*189] strong enough to counteract the public policy encouraging executive secrecy.

demonstrate that without accessing records of his deliberation, committee would not be able to fulfill its function responsibly.

Insofar, when president and his officials invokes the privilege to investigation disclosure, court basically of the position to weighing interests case by case¹²⁰, while recognizing “presumed executive privilege”. But for now, there is no decision of the Supreme Court has decided on government side.¹²¹

Moreover, executive may not raise statutory prohibition of disclosing material and barring public access of certain material against Congressional investigation. Court constantly held that “agencies and private parties may not deny Congress access to such information on the basis of such provisions as long as this disclosure would serve a valid legislative purpose.”¹²²

2.3.2 *Personal rights of the witness*

Parliamentary investigations, usually involve criminal matters, inquire into abuse of power and wrongdoings of officials, thereby there is more or less probability of subsequent criminal proceeding and witnesses may face criminal charge. On the other hand, in principle investigation evidence taking is usually held in public. It is also possible that inquiry involve individual private sphere and facts which people may legitimately wants to keep secret. These features raise important issue of protection of personal rights, in privacy concern and due process rights. Therefore, this issue deserves much attention when discussing parliamentary inquiry. Both jurisdictions have taken into account these matters as limitation to parliamentary investigation.

¹²⁰ Kalah Auchincloss, *Congressional investigations and the role of privilege*, 43 Am. Crim. L. Rev. 165, winter, (2006), p13

¹²¹ Full info p14

¹²² Full info p16

The US Supreme court held in its various decisions that “the Bill of Rights is applicable to Congressional investigations as it is to all forms of government action”¹²³. Individual who called before the committee to testify may refuse to do so referring his or her certain personal rights.

*Fifth amendment rights*¹²⁴

Two cases, during the HUAC committee, which is infamous for their abusive investigation, appeared before the court established this standard in US system¹²⁵. First is the case of *Quinn v. United States*. Tomas Quinn, a witness convicted for contempt brought case before the Supreme Court, who declined the question of the committee, alleging that his testimony could have incriminated himself. Court asserted his 5th amendment privilege, stating that “assertion of the privilege against self-incrimination is sufficient to limit the investigating committee's questioning of that witness”¹²⁶ just as granted in criminal proceeding.

Again the case of *Watkins v. United States* provides guidance. Court expanded the personal right limitation in this case. Court stated that although “it is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action [but] witnesses cannot be compelled to give evidence against themselves. They cannot be subjected to unreasonable search and seizure. Nor can the First Amendment freedoms of speech, press, religion, or political belief and association be abridged.”¹²⁷

Granting immunity

¹²³ *Watkins v. United States*, 354 U.S. 188 (1957)

¹²⁴ The Fifth Amendment to the US Constitution provides that “no person . . . Shall be compelled in any criminal case to be a witness against himself”.

¹²⁵ See J. Richard Broughton, *Paying Ambition's Debt: Can the Separation of Powers Tame the Impetuous Vortex of Congressional Investigations*, 21 Whittier L. Rev. 797. (2002) p4

¹²⁶ *Quinn*, 349 U.S. at 164-65

¹²⁷ *Watkins* at 188

Nevertheless, though witness refuses to testify by invoking the Fifth Amendment, committee still compel testimony by granting the immunity through the court order, which issued by committee's request¹²⁸. There are two types of immunity: the use or partial immunity grants him that information resulting from his testimony before committee will not be used against him following criminal trial. But still witness can be tried on the basis of other evidence. This issue is regulated by criminal code¹²⁹.

Although it is a tool provided to committee to make parliamentary investigation more effective as subpoena and contempt, it is very critical due to causing more burdens to further prosecution and enforcement of criminal law especially in high profile cases¹³⁰. Which interest should prevail is again interesting issue of academic debate. But for now, once Congressional request of immunizing order duly to procedural requirements in the statute, court does not have right to refuse.

*First amendment rights*¹³¹

Judicial practice also recognized that 1st amendment right of witness can be extended as objection to subpoena or contempt during the parliamentary investigation¹³². However, while 5th amendment is absolute restriction to compulsory power of committee, 1st amendment rights enforcement is decided by balancing with Congressional interest. Important case in this issue is *Barenblatt v. United States*. Court held that "where first amendment rights are asserted to bar government interrogation, resolution of the issue always involves a balancing

¹²⁸ Louis Fisher, *Congressional Investigations: Subpoenas and Contempt Power*, (Cong. Res. Serv., CRS Report for Congress, Order Code RL31836, Apr. 2, 2003) p9

¹²⁹ 18 U.S.C. 6002, 6005

¹³⁰ See Howard R. Sklamberg, *Investigation versus prosecution: the constitutional limits on congress's power to immunize witnesses*, 78 N.C.L. Rev. 153 (1999), p26-27

¹³¹ Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

¹³² Full info p29

by the courts of the competing private and public interests at stake in the particular circumstances shown.”¹³³

Rights concern in the committee of inquiry of the Bundestag

Privacy rights are the limits of parliamentary action under the following legal rules. According to the Basic law of the Germany, the privacy of correspondence, posts and telecommunications shall not be affected by parliamentary investigation¹³⁴. Since the German Basic law has guaranteed privacy rights in the article 10 as a basic right, the committee of inquiry as a legislature’s action shall be bounded by fundamental rights pursuant to article 1.3 of the Basic law. But the court held that fundamental right of privacy had to be balanced with the constitutional interest in an effective parliamentary investigation. “Privacy rights may be restricted only by overriding public interest vested in the committee, considering the proportionality principle and provided by certain precautions of confidentiality.”¹³⁵ Also, the special statute by referring to Criminal procedural law provides list of person who can refuse to testify or give information under the professional (physician, lawyer, etc) and personal relational grounds (spouse, close family member, etc).¹³⁶

To conclude for part, As we seen above, the constitutional law principles, separation of power and basic human right protection are central restrictions in both jurisdictions.

In both countries, when investigations directed to executive actions, it is firmly recognized by constitutional adjudications that the executive privilege founded in the separation of power restrict parliamentary right. The executive privilege in both countries includes confidentiality of certain area of executive functioning and state interests in security which disclosure of them would lead to harm the responsibility of government or to the common interest. Burden

¹³³ Barenblatt v. United States 360 U.S. 109 ,(1959) p198

¹³⁴ Basic Law for the Federal Republic of Germany 1949, Art. 44.2

¹³⁵ Neue Heimat – BVerfGE 77, 1-64

¹³⁶ Act Governing the Legal Framework for Committees of Inquiry 2001, Art. 22.1 , 22,2

of proof seems different. In the US, against the presumed privilege of the executive, the Congress has to show the compelling needs of requested matter, while in Germany, government withholding information has to provide the sound reason of potential danger of disclosure. However, both countries judicial practice shows that courts give greater deference to the parliamentary right to investigate.

Personal right restrictions have similar constitutional root as executive privilege both countries. While privilege against self-incrimination is an absolute bar to restriction in US Congress, unless provided immunity, 1st amendment rights in US constitution and privacy rights in German Basic law will be balanced against public interest, which parliamentary investigation is representing.

2.4 Minority rights in the parliamentary investigation

As a representative organ, the majority principle applies to all parliamentary decision makings; and within the investigation committee too. But certain power balance within the parliament necessary to be considered. If there is no power balance and active involvement in this powerful tool, this can become just tool of majority political game and thus not effective, even dangerous to political opposition. We will see in this part that minority involvement in parliamentary investigation certainly shapes the effectiveness parliament's ability to oversee the government.

As I discussed before, minority involvement in general oversight in Mongolian parliament is very limited. All activities of mentioned working groups establishment, taking evidence were decided by majority principle and report also is expected this way.

A note on Bundestag committee of inquiry

As we have seen before, the German Basic law provides the parliamentary investigation is a tool of oversight specially dedicated to minority. Upon the demand of the qualified minority, without the support of ruling party, or even against the will of majority Bundestag obliged to set up a committee of inquiry. This prevents from majority to block the establishment of such a committee, which would pursue an explanation of facts independently and hear evidence of illegal or improper conduct by a ruling governmental majority.¹³⁷

This arrangement is based on the theory that “in modern parliamentary democracies separation of powers manifests itself most effectively not in the checks and balances among branches of government but in the duty of opposition parties to confront and publicize the misdeeds of the ruling majority.”¹³⁸ To this end, in addition to the establishment, constitutional court and further legislations expanded the minority right within the committee, limited the majority principle in the committee and ensuring the possibility to participate in the investigation in the same manner as the majority of the Committee. Moreover, The Constitutional court confirmed that qualified minority has standing before the court regarding its constitutional right in the parliamentary investigation, even if it is an intra-branch dispute between majority and minority.¹³⁹

2.4.1 Minority rights in initiation and composition of the investigation

As mentioned before pursuant to the Basic law, Bundestag is obliged to establish the committee of inquiry upon the motion of minority or opposition, qualifying required number

¹³⁷ Volker Röben., *Federal Constitutional Court Defines the Power of Parliamentary Minorities in the Constitutionally Established, Parliamentary Investigative Committees*, German Law Journal Vol. 3 No. (2002)

¹³⁸ Donald P Kommers, *The Federal Constitutional Court: guardian of German democracy*, The Annals of the American Academy of Political and Social Science 2006; 603; 111. p116

¹³⁹ 2 Bve 2/1 cited in Volker Röben., *Federal Constitutional Court Defines the Power of Parliamentary Minorities in the Constitutionally Established, Parliamentary Investigative Committees*, German Law Journal Vol. 3 No. (2002).

of members. In the case of minority investigation, the object of the inquiry phrased according to the motion of the qualified minority.

The Constitutional court established this principle in the case of *Land of Schleswig-Holstein*, the very first case regarding the parliamentary investigation¹⁴⁰, stating that “the parliamentary minority's right to initiate an investigative committee was protected from the efforts of the parliamentary majority to add matters to the committee's mandate in an effort to slow down and possibly divert the investigation as originally defined by the parliamentary minority”¹⁴¹. Statute also provides this principle.¹⁴²

In US Congressional investigation, initiation is decided by majority. Pursuant to the present Rules of the House of the Representative, the chairman and ranking minority member of the committee both decide to place issue of establishment of investigative subcommittee on the committee agenda upon the compliant. But actual establishment of it shall decided by affirmative vote of a majority of the members of the committee regardless of who put the issue on the agenda.¹⁴³ Also expansion of the scope of the investigation is decided by affirmative majority.¹⁴⁴

The composition of the committee in Bundestag is decided at the time of the establishment. Generally, most committees are relatively small with between 5-7 members.¹⁴⁵

The Statute provides that committee composed of members is in proportion to parties strength in the Bundestag and that each group must be represented in the committee.¹⁴⁶

In contrast, the investigative committee of US Congress composed equal members from two parties. It is different from other committees which reflect the proportion to the

¹⁴⁰ Ibid BVerfGE 49, 70

¹⁴¹ Volker Röben., *Federal Constitutional Court Defines the Power of Parliamentary Minorities in the Constitutionally Established, Parliamentary Investigative Committees*, German Law Journal Vol. 3 No. (2002)

¹⁴² Act Governing the Legal Framework for Committees of Inquiry 2001, Art. 2.2

¹⁴³ House rules XI

¹⁴⁴ Ibid

¹⁴⁵ Winfried Stefanni. *Parties and committees in the Bundestag* in the “US Congress and the German Bundestag, Comparison of democratic processes”, 1990, page 280-281

¹⁴⁶ Act Governing the Legal Framework for Committees of Inquiry 2001, Art. 4

party's strength in the House. Pursuant to the House rules, it “shall compose of four Members with equal representation from the majority and minority parties”¹⁴⁷, chosen among the 10 members from each party who named at the beginning of the Congress to be available to serve on the investigative subcommittee during that term for each committee¹⁴⁸.

2.4.2 Minority right in taking of evidence

In Bundestag, the minority right in the committee, especially in collecting the evidence is also extended by constitutional interpretation by the court. Recent constitutional court decision on political party donation case provides clear guidelines of minority right in the committee. The case was brought by minority members in the committee, established to inquiry into alleged scandal about unlawful and unreported private donations to the political parties in the Bundestag. Minority party requested to hear certain witnesses including Chancellor Schroeder, and materials about financing and property of the majority party. The committee by majority decision rejected the motion under the ground that requested evidences were out of the committee's mandate¹⁴⁹.

By deciding this case, court affirmed that right of the qualified minority in the Article 44.1(1) of the Basic Law is not only limited to move for establishment of the committee. Since “constitutional tension between the parliamentary majority and the qualified parliamentary minority that exists in establishing a committee continues in the process of investigation”¹⁵⁰, minority shall accorded other implied rights to ensure the purpose of the constitutional provision.

¹⁴⁷ House rule XI, Procedures of committees and unfinished business

¹⁴⁸ House rule X, Organization of committees.

¹⁴⁹ Volker Röben., *Federal Constitutional Court Defines the Power of Parliamentary Minorities in the Constitutionally Established, Parliamentary Investigative Committees*, German Law Journal Vol. 3 No. (2002)

¹⁵⁰ Ibid

Court declared that minority's right to involve in deciding which evidence should be examined shall be considered of equal weight with majority. But certainly, it may not extend the beyond the majority rights and should be within the framework of the mandate.¹⁵¹

Although this committee was established by majority motion, "the right of the qualified minority to adequate consideration of its motions for the admission of evidence thus also exists here"¹⁵². Court cautioned that, if minority does not provided this right, since it can oblige plenary to establish committee, there is possibility that competing committee against majority inquiry on the same matter and compete for evidence. This would impair the investigation.¹⁵³ Moreover, there is a chance that majority uses inquiry against the opposition, "the qualified minority must remain able to object to the establishment of the committee of investigation and, after these efforts have failed, nonetheless to actively participate in shaping its work, in order to secure an investigation that in its view is balanced."¹⁵⁴ Thus, qualified minority should enjoy this procedural right implied in the 44.1 of the Basic law.¹⁵⁵

Court also stated that if majority refuses the qualified minority's motion for admission of evidence according to principle of majority decision in the article 42.2 of the Basic law, it must provide that reasonable justification for doing this. Reasons can be requested evidence falls outside the subject matter of the inquiry or is illegal or minority misuses its right.¹⁵⁶ Also majority when exercising its decision making rights (in Basic law 42.2) it must ensure "by means of appropriate procedural rules, that the minority is adequately considered and heard."¹⁵⁷

¹⁵¹ Ibid

¹⁵² Ibid

¹⁵³ Ibid

¹⁵⁴ Ibid

¹⁵⁵ Ibid

¹⁵⁶ Ibid

¹⁵⁷ Ibid

Not broadly as in Bundestag, but in Congress, as stated in the current House rules, Minority members are accorded some rights, for example any kind of hearing, “the minority may, upon the written request of a majority of the its members to the chairman before the completion of the hearing, call witnesses selected by the minority.”¹⁵⁸

2.4.3 *Separate opinion in the report*

Finally, minority right is also ensured in requirements for report of the committee.

The committee of inquiry German Bundestag shall submit its outcome of investigation in final report, which consists of evaluation of the facts and recommendations.¹⁵⁹ If there are disagreement regarding the evaluation of the finding between ruling coalition and the opposition, as is mostly the case, the report includes both the majority and minority opinions separately.¹⁶⁰

The US House rules provides that, “members have right to add minority, or additional views on any measure or matter, which must be included in the committee report”¹⁶¹. This general rule also applies to reports of investigative committees. A prominent specialist on Congressional investigation urged the importance of written rules insuring “the minority’s meaningful opportunity to read and evaluate the majority report and submit its alternative point of view”¹⁶² if there no joint agreement on the report.

Since final decision of the committees in both jurisdictions is reflection of majority opinion, it is possible that final report affirms de facto. However, the main importance of separate opinion is that it will provide public opportunity to observe and analyze distinct

¹⁵⁸ House Rule XI, Procedures of committees and unfinished business. Calling and questioning of witnesses (j)(1), US 110th Congress

¹⁵⁹ Herman J. Schreiner and Susannne Linn, *German Bundestag function and procedures*, 16th electoral term. 2006 edition, p 43-44

¹⁶⁰ Ibid. p41

¹⁶¹ Clause 2(l), Rule XI and clause 3, Rule XIII of 110th, Committee oversight & investigations: A user’s guide to relevant house rules., available at http://www.rules.house.gov/archives/comm_oversight.htm

¹⁶² Richard J. Leon, Congressional investigations: Are partisan politics undermining our vital institutions? 31 Suffolk u. l. rev. 825., (1998) p11

positions and reasoning of the majority and opposition clearly in political controversies. If contrary evaluation of the facts reasonably comprehensive, it is not easy for the other side to insist on its own and it leads to better discussion.

Conclusion. The right of the minority in the investigation committee basically well accorded in both jurisdictions. In Bundestag committee, establishment and the object of examination is at minority hand, while in US, it is according to the general majority principle. Minority rights to demand certain evidences and to express separate opinion are both exist in jurisdictions and certainly influence the outcome.

US Congressional rule about equal membership from prearranged list in investigative committee is also interesting experience. But we also have to consider this rules' hierarchy. In Bundestag they are principles set by the Constitutional court, while in Congress they area just resolution, subject to change easily by terms.

Non-regulation stated above is not advantage; Mongolian framework has to consider these minority right concerns provided that its general problem of weak oversight is triggered by absence of the substantial minority rights in the parliament.

CONCLUSION

From the comparison of Congressional investigation and Bundestag committee of inquiry, I may conclude system of government certainly has role in this instrument. Because of this the committee of inquiry in Bundestag more stressed on broadening the minority right, to balance power between majority and minority while in Congressional investigation strives for more balance between branches, therefore main issues around investigation are extent of competence, limitations and privileges, or enforcement of congressional rights. Although there is some structural and consideration differences, due to similar compelling power, and its restrictions we can observe comparable nature and functioning. Sufficient competence in the legal framework and greater deference from judiciary shows that this is an important instrument of effective oversight in both parliaments.

However, based on these examples, the closer look at Mongolian version of the investigation, tells us that there is certainly need of either to enhance the capacity of existing tool, clarifying the legal background of working committee or creating new special committee. The “working group” clearly lacks of necessary power and poor legal background makes it impossible to exercise proper parliamentary investigation. In order to create parliamentary investigative committee properly or to modify the old one, the following suggestion can be made in light of this paper.

If it is a parliament, to oversee government as representative of the people, investigative power of the parliament, especially in relation to executive should be regarded in constitutional level as in the both countries. Without recognizing essential right of the parliament, oversight potential would always dependent on government or majority and turn into just formality. Mongolian Constitution provides adequate ground for this power to the State Great Hural by general oversight provision and further powers referred by other laws.

Thus to provide itself investigative power not conflicts with the Constitution. To have this power does not mean that there will constant investigations to the executive and hinder their work. To have this potential and threat to investigation is itself disciplines executives in certain better level.

Maybe to avoid situation as opposition uses this power abusive way or parallel investigations on the parts of the one complex issue and contradicts each other, which appeared in the case of Mongolia, German model of independent ad hoc committee of investigation established by plenary is better for Mongolian parliament.

This investigative right of the parliament will realized with its tools, right to summon information and a legal threat for not complying parliamentary demands.

Constitutional restriction to this power, a separation of power principles have to be maintained as well. Executive privilege and judicial independence have to be respected in the investigation. If there is dispute whether certain information can be taken as evidence to the parliamentary investigation or is it falls within the executive privilege or protected by judicial independence, the Constitutional court has to recognize these kinds of disputes within its already granted jurisdiction as a dispute between branches.

In one hand, German criminal procedural analogy in taking evidence and privacy right concerns, in other hand Congressional investigative power restriction by procedural rights, such as due process rights and prohibition of self-incrimination makes them similar results through other arrangements. Given that these procedural principles already established in Mongolian criminal procedural law, analogical application to taking evidence is also useful to maintain exercise of this power to be fair and considered to personal rights which might involved in the investigation.

As a state with parliamentary government, the minority right concern in German committee is especially crucial to us. As said before, the role of opposition in parliament to effective

oversight is critical in this situation. By connecting political ambition of the minority in parliament to the effective oversight tool such as parliamentary investigation, this will provide more power balance between parties, so forth to the balance between parliament and executive. Minority equal right in taking evidence and expressing separate conclusion provided in both countries is crucial in this regard. Moreover, without right to initiate the investigation of the opposition with certain requirement number to maintain balance, it is senseless to wait for effective investigation from the majority in Mongolian situation.

To prevent from a gridlock of the committee work because of dispute about investigation issues between the majority and minority, recognition of standing of both of them before the court as in the German constitutional court, also have to be considered.

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